GOVERNMENT OF MALAYSIA v. DATO CHONG KOK LIM

[O.C.J. (Sharma J.) June 5, 1973]

[Ipoh — Civil Suit No. 95 of 1973]

Practice and Procedure — Res judicata — Interlocutory judgment — Binding upon parties in every proceeding in suit — R.S.C. 1957, O. 25 r. 4 and O. 19 r. 27.

The plaintiff had taken out a specially indorsed writ against the defendant for recovery of income tax, interest and costs. The defendant filed an application for an order to strike out the statement of claim on the grounds, *inter alia*, that the statement of claim was frivolous and vexatious and an abuse of the process of the court. The application was dismissed by Chang Min Tat J. ([1973] 1 M.L.J. 161). The defendant filed his statement of defence and counterclaim and subsequently filed an application for an order to strike out the claim of the plaintiff, on the ground that the plaintiff was not entitled to maintain a claim in respect of tax and penalties for the years of assessment 1961-1967.

Held: the defendant was estopped on the principle of *res judicata* from making the application and therefore the application must be dismissed.

Cases referred to:-

(1) *Russian Commercial and Industrial Book* v. *Le Comptoir D'Escompte De Mulhouse and others* [1924] All E.R. Rep. 381, 390.

(2) *Duchess of Kingston's Case* 1 Smith's Leading Cases (13th Ed.) 644.

(3) *Ram Kirpal* v. *Rup Kuari* 11 I.A. 37; I.L.R. 6 All 269, 274.

(4) *Satyadhyan Ghosel & Ors.* v. *Sint Deorajin Dobi & Anor.* A.I.R. 1960 S.C. 941.

(5) *Peareth* v. *Marriott* (1883) 22 Ch. D. 182.

(6) *Hook* v. *Administrator General of Bengal and others* 48 I.A. 187.

(7) *In the matter of the Trusts of the Will of Tan Tye (deceased)* [1936] M.L.J. 141, 147-151.

(8) *Louis Dreyfus* v. *Aruna Chalaayya* (1931) 58 I.A. 381.

(9) *Knowles* v. *Roberts* (1888) 38 Ch. D. 263, 270, 271.

(10) *Devy* v. *Garrett* 7 Ch. D. 473.

CIVIL SUIT.

Zulkifli bin Mahmud (Senior Federal Counsel) for the plaintiff.

Chin Yew Meng for the defendant.

Sharma J.: The plaintiff took out a specially indorsed writ against the defendant on 17 May 1971 for recovery of $7,245,901.38, interest and costs. The plaintiff's claim is under the provisions of the Income Tax Ordinance 1947 and Income Tax Act 1967. The defendant entered an appearance (Enclosure 4) on 9 June 1971 and on 29 June 1971 filed an application (Enclosure 9) for an order, *inter alia*, to strike out the statement of claim on one or more of the following grounds: —

(a) The statement of claim "was frivolous and vexatious and an abuse of the process of court."

(b) The statement of claim disclosed no reasonable cause of action and was frivolous and vexatious.

(c) The statement of claim tended to prejudice, embarrass and delay the fair trial of the action.

The aid of inherent jurisdiction of the court was sought by the defendant for the order he was asking for in Enclosure 9 under ground (a) while his sheet anchor under grounds (b) and (c) was Order 25 rule 4 and Order 19 rule 27 respectively.

An affidavit (Enclosure 8) of the defendant was filed in support of that application. Paragraph 1 of that affidavit was a mere paraphrase of prayer (i) of Enclosure 9. The rest of the paragraphs in the said affidavit concerned prayer (ii) rather than prayer (i) of the application or were in the nature of arguments or legal submissions. There was another affidavit (Enclosure 15) sworn to by one Mr. Mathai, a tax consultant giving his views —

"to *prove* that the action is frivolous and vexatious and an abuse of the process of the court and tends to prejudice, embarrass and delay the fair trial of the action, *if any at all.*" (The emphasis is mine.)

The application (Enclosure 9) came up for hearing on 5 July 1971 before my brother Chang Min Tat J. and seems to have been very fully and elaborately argued with all the skill and learning of the counsel as seems apparent from the well considered and very thoughtful written judgment delivered by the learned judge on 18 December 1972. I need not reproduce passages from that judgment of Chang Min Tat J. to show how well he had considered the case of the defendant. I have no doubt that that judgment will form part of the Appeal Record and so will the various enclosures to which I have made reference. In short the defendant's application (Enclosure 9) was dismissed with costs.

The defendant filed his statement of defence and counterclaim (Enclosure 18) on 26 December 1972. It is, however, not necessary to go into the defence at this stage except to say that a plea has been taken that the statement of claim discloses no reasonable cause of action and that the notices of assessment are void *ab initio*. (I mention it merely to indicate that the defendant could always, if those pleas are sustainable, make an application under Order 25 rule 2 of the Rules of the Supreme Court but that stage is not yet reached and I am, in any case, not dealing with that application.) On 16 January 1973 the plaintiff filed an application under Order 14 rule 1 for leave to sign final judgment. That application has still got to be heard by me on appeal from the order of the Senior Assistant Registrar and has no bearing on the defendant's present application.

On 9 April 1973 the defendant filed two applications (Enclosure 31 and Enclosure 33). Both the applications came up before me on 4 May 1973. Enclosure 31 was for leave to amend the statement of defence and Enclosure 33 was *for striking out the claim of the plaintiff* for recovery of tax and penalties particularised in paragraph 3 of the statement of claim. The application was not supported by any affidavit nor was any affidavit intended to be used by the defendant at the hearing of this application. (See Order 38 rule 20). I asked Mr. Chin Yew Meng, counsel for the defendant, if there was any change in circumstances or pleadings which had altered the position since the earlier application (Enclosure 9) was made and dismissed on 18 December 1972. I was told that the application was still under Order 25 rule 4 but the ground for making the present application was different. Mr. Chin's contention was that the previous application was based on the ground that the plaintiff's claim was vexatious and frivolous and that the ground for making

the present application was that the plaintiff was not entitled to maintain a claim in respect of tax and penalties for the years of assessment 1961-1967 particularised in paragraph 3 of the statement of claim. Paragraph 3 of the Statement of Claim reads:

"The defendant was assessed to Additional Income Tax for the years of Assessment 1961, 1964, 1965, 1966, 1967, 1968 and 1969 and was also required to pay penalties under section 91 of the Income Tax Ordinance, 1947 for the Additional years of Assessment 1961, 1964 and 1965. Further under section 10A and the Fourth Schedule of the Income Tax Ordinance 1947, the defendant was assessed to Tin Profits Tax for the Additional years of Assessment 1965, 1966 and 1967. The amounts of tax and penalties are as follows:

Year of Additional Assessment	*Amount of Additional Income Tax*	*Tin Profit under section 91 Fourth Schedule of Income Tax Ordinance, 1947.*	*Penalty under section 91 of Income Tax Ordinance, 1947.*	*Total*
1961	$ 42,510.49	—	$ 42,510.49	$ 85,020.98
1964	$ 133,006.50	—	$133,006.50	$ 266,013.00
1965	$ 452,327.00	$ 49,476.00	$501,803.00	$1,003,606.00
1966	$1,699,507.90	$126,580.40	—	$1,826,088.30
1967	$1,430,973.20	$100,782.60	—	$1,531,755.80
1968	$1,755,331.70	—	—	$1,755,331.70
1969	$ 778,085.60	—	—	$ 778,085.60
				$7,245,901.38"

The defendant was thus, in effect, seeking to strike out a part of the plaintiff's claim.

Order 25 rule 4 of the Rules of the Supreme Court reads as follows: —

"The court or a judge may order any pleading to be struck out, on the ground that *it discloses no reasonable cause of action* or answer, and in any such case or in case of the action or defence *being shown by the pleadings to be frivolous or vexatious*, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just." (emphasis is mine.)

Prayer 1(b) of the former application (Enclosure 9) is in the following terms:

"(b) an order that the plaintiff's Statement of Claim be struck out under the Rules of the Supreme Court, 1957, Order 25, Rule 4, *on the grounds that it discloses no reasonable cause of action and is frivolous and vexatious.*" (emphasis is mine.)

The relevant words used in prayer 1(a) in Enclosure 33 are:

"(a) ... on the ground that the plaintiff cannot maintain a claim in respect of the tax and penalties."

This can only mean that there is no cause of action disclosed in paragraph 3 of the statement of claim in so far as that claim relates to the tax and penalties for the years of assessment 1961 to 1967. I drew Mr. Chin's attention to prayer 1(b) in Enclosure 9 and asked him whether the matter was not already *res judicata*. Mr. Chin was of the view that the judgment of Mr. Justice Chang Min Tat on Enclosure 9 dismissing the entire application with costs could not in law constitute a bar to his making a fresh application under Order 25 rule 4 and that no question of *res judicata* arose under the circumstances of the case. He quoted the case of *Russian Commercial And Industrial Bank* v. *Le Comptoir D'escompte De Mulhouse And Others*[1] in support of his contention. I did not see any merit in the contention of Mr. Chin and dismissed the application with costs.

The following classic passage from the judgment of Sir William de Grey found in *The Duchess of Kingston's Case*[2] is a statement of the leading principles of *res judicata*.

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

The principles of *res judicata* are codified in section 6 of our former Civil Procedure Code which is the same as section 11 of the Indian Civil Procedure Code. It was at one time thought that as the words used in section 6 were "has been directly and substantially in issue in a former suit" the principles of *res judicata* could not apply to proceedings in the same suit. The Privy Council, however, held in the case of *Ram Kirpal* v. *Rup Kuari*[3] that upon general principles of law an interlocutory judgment in a suit was binding upon the parties in every proceeding in that suit. Their Lordships said:

"The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and these claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. *The binding force of such a judgment depends not upon section 13, Act X of 1877* (section 6 of our former Civil Procedure Code) *but upon general principles of law. If it were not binding there would be no end to litigation.* ... the parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did (i.e. that the decree awarded future means profits) ... a decision which, not having been appealed, was final and binding upon the parties and those claiming under them."

Section 6 of our former Civil Procedure Code did not draw any distinction between an issue of fact and an issue of law. An issue of law operates as *res judicata* in the same way as an issue of fact. In both cases, however, the matter must have been directly and substantially in issue in a former proceeding be-

tween the same parties or their representatives in interest.

In *Satyadhyan Ghosel and others* v. *Sint Deorajin Dobi and another*,[4] the statement of the law on the subject is given thus:

"The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth* v. *Marriott*,[5] *Hook* v. *Administrator-General of Bengal and Others*[6] and *In the matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo* v. *Tan Yew Ghee and Another*[7]). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus* v. *Arunachala Ayya*[8]).

The subject of the ground of attack in Enclosure 9 fully covers the subject of attack in Enclosure 33 and, therefore, in my view, the defendant is barred from reagitating the same or a part of the same matter which has already been finally adjudicated upon by Mr. Justice Chang Min Tat. The defendant did not appeal against that decision and so far as Enclosure 9 is concerned the judgment of Mr. Justice Chang Min Tat, in my view, is final and conclusive at this stage of the proceedings. The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of *res judicata* deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively *res judicata*. The rule of constructive *res judicata* is really a rule of estoppel. The question now raised has already been heard and finally decided. It constitutes but a part of the prayer in the former application. It was not collaterally or incidentally but directly and substantially in issue when Enclosure 9 was heard and decided. The answer to the matter is simple. The defendant's only remedy was by way of an appeal against the decision of Mr. Justice Chang Min Tat. The matter was heard on merits and finally decided. It is not capable of readjudication by the same court in the same suit. The defendant could certainly reagitate the matter before the Federal Court *if* the plaintiff finally succeeds in obtaining judgment and an appeal is filed against that judgment. The law, as I understand it, is that the defendant is precluded from filing a second application in respect of a matter which was directly and substantially in issue in the earlier application (Enclosure 9) in this very court. If a decision has been given with respect to a matter or part of a matter in controversy between the parties by a court of competent jurisdiction it remains binding in the subsequent stages of the same proceedings in the same court and cannot be re-opened in that court. In my view an erroneous decision irrespective of whether it is on a question of law or fact operates as *res judicata* between the parties to it. The correctness or otherwise of a judicial decision seems to have no bearing upon the question whether it operates as *res judicata* or not. Until that decision is reversed or set aside on appeal its finality and binding force remain operative on the parties.

Learned counsel for the defendant was, on his own submission, making the application under Order 25 rule 4 and it was up to him to bring his case within the four corners of that rule. The authorities lay down that it is only in very plain and obvious cases that the court should take recourse to the drastic procedure made available under Order 25 rule 4 and that powers under that rule are to be used only when the pleading is not only demurrable but such that it is worse than demurrable.

In *Knowles* v. *Roberts*,[9] Bowen L.J. said:

"It seems to me that the rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right.

We have been told this is a matter of discretion for the judge. Ine one sense it is a matter of discretion, but that, be it observed, does not completely define the situation. The judge is clothed by the rule with power which he may exercise, *but the same rule that clothes him with power defines the object for which the power has to be exercised, in the definition which it gives of the subject-matter to which the power should be applied. It becomes, therefore, the duty of the judge who has to apply the rule, to apply his power in a fit case; and a fit case will be that which fulfils the*

definition of the rule, and in which there are no other circumstances which make it inappropriate, and inconvenient, or unjust to apply the power. And when it is spoken of as a power of discretion, it must be remembered that in that sense only is it a power of discretion." (Italics supplied).

His Lordship then went on to quote from Lord Justice James' judgment in *Davy* v. *Garrett*[10] where Lord Justice James had said:

"The argument was strongly pressed upon us that this was an appeal from a matter lying within the discretion of the judge, and an observation of my own in *Watson* v. *Rodwell* (3 Ch. D. 383) was relied on. I do not know whether my expressions were stronger than was required; but it is very important that time and money should not be wasted in appeals on interlocutory matters, and I have therefore always set my face against appeals from the discretion of the judge in matters of procedure. But a defendant may claim *ex debito justitiae* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it."

Knowles v. *Roberts*[9] was no doubt a case under Order 19 rule 27 but it is indicative of the purpose, limits and extent of the exercise of that discretion. It is for the defendant to show that inspite of the provisions of the Income Tax Act relied upon by the plaintiff and the service of the notices on the defendant under that Act, paragraph 3 of the statement of claim discloses no reasonable cause of action. A cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove to support his right to the judgment of the court. It includes all material facts on which the suit is founded although it does not comprise every piece of evidence which is necessary to prove each fact but it does include everything which if not proved would give the defendant a right to immediate judgment in his favour.

The plaintiff has brought its present claim under rights conferred on it by statute. In paragraph 3 of the statement of claim it has only sought to give particulars of how the figure of $7,245,901.38 is arrived at. Paragraph 3 of the statement of claim is in fact the very basis of the plaintiff's claim. Is it possible for the plaintiff to proceed with any hope of success in its claim unless the facts alleged in paragraph 3 are proved? Learned counsel for the defendant should have known the answer to that.

The defendant has made no effort to show how the statement of claim discloses no reasonable cause of action against him. It is only that limb of Order 25 rule 4 which deals with the statement of claim disclosing no reasonable cause of action that the defendant wished to rely on. There was no evidence before me which could even remotely suggest that there was no reasonable cause of action disclosed in the statement of claim. There were even no arguments put forward to show that paragraph 3 of the statement of claim disclosed no reasonable cause of action.

The application was consequently dismissed with costs and a certificate under Order 54 rule 22A of the Rules of the Supreme Court issued.

Application dismissed.

Solicitors: *Allen & Gledhill.*

YUE SANG CHEONG SDN. BHD. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.)

June 28, 1973]

[Kuala Lumpur — Federal Court Criminal Reference No. 3 of 1973]

Criminal Law and Procedure — Company — Whether limited company can be guilty of criminal offence where mens rea is required and without proof of mens rea of its agent or officers — Reference to Federal Court — Whether Federal Court has any jurisdiction or power beyond answering the questions of law — Whether Federal Court has powers of review — Courts of Judicature Act, 1964 (Act 91), s. 66 — Customs Act, 1967, s. 135(1)(d).

Practice and Procedure — Federal Court — Jurisdiction — Whether Federal Court has powers of review when points of law referred to it — Courts of Judicature Act, 1964, s. 66(5).

Customs — Limited company — Whether can be guilty of offence where mens rea is required — Customs Act, 1967, s. 135(1)(d).

The applicant company had been convicted of the offence of knowingly being in possession of certain prohibited goods and had been fined $1,620. Its appeal against conviction was dismissed by the High Court. Thereupon application was made by the company to refer the following questions of law to the Federal Court —

(1) Whether a limited company charged under section 135(1)(d) of the Customs Act, 1967 can be guilty of such criminal offence without proof of *mens rea* of its agent or officers.

(2) If the answer to (1) is in the negative, whether it is relevant to consider the relative importance of the agents or officers of the limited company whose knowledge is to be imputed to the company.

Held: (1) as *mens rea* was essential for proof of guilt in this case, the limited company could not be guilty of the offence without proof of *mens rea* of its agents or officers;

(2) the persons whose knowledge would be imputed to the company would be those who were entrusted with the exercise of the powers of the company;

(3) (*Per* Ong C.J. and Ong Hock Sim F.J., Gill F.J. dissenting) although the questions referred had been rightly answered by the learned judge who referred the case to the Federal Court, the Federal Court could exercise its power of review and interfere with the decision of the learned judge, if it was satisfied that that decision was wrong.

Cases referred to:

(1) *Tesco Ltd.* v. *Nattrass* [1972] A.C. 154.

(2) *Ibralebbe* v. *Reg.* [1964] 1 All E.R. 251, 257.

(3) *Attorney General for Northern Ireland* v. *Gallagher* [1961] 3 All E.R. 299, 300, 314.

(4) *Miller* v. *Ministry of Pensions* [1947] 2 All E.R. 372.

(5) *Ng Eng Kooi & Anor.* v. *Public Prosecutor* [1970] 1 M.L.J. 267.

(6) *R.* v. *Carr Briant* [1943] K.B. 607.

(7) *R.* v. *Cohen* [1951] All E.R. 203, 206.

(8) *Hadley* v. *Perks* (1886) L.R. 1 Q.B. 444, 457.

(9) *Reg.* v. *Hester* [1972] 3 W.L.R. 910, 921.

FEDERAL COURT.

Zyx Owen for the applicant.

Gunn Chit Tuan and *K. C. Vohrah* (Senior Federal Counsel) for the respondent.

Ong C.J.: In the Sessions Court at Kuala Lumpur the applicant, a limited company, was charged under